97-110 JUL 17 1997 COPY
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STEVE BRODEUR and DR. ALEX ASTORGA, *Petitioners*,

v.

TODD LEWIS ASHKER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
PETER J. SIGGINS
Senior Assistant Attorney General
MORRIS LENK
Supervising Deputy Attorney General
BRUCE M. SLAVIN
Supervising Deputy Attorney General
Counsel of Record
50 Fremont St., Room 300
San Francisco, CA 94105
Telephone: (415) 356-6048
Fax: (415) 356-6070
Counsel for Petitioners

27 pp

Petitioners, Correctional Officer Steve Brodeur and Dr. Alex Astorga, former Chief Medical Officer of the Pelican Bay State Prison, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit filed April 18, 1997, in this case.

QUESTION PRESENTED

Does the Eleventh Amendment bar the federal courts from holding state officials liable for violating state tort laws?

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL, PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
Cases	
Ashker v. California Department of Corrections 112 F.3d 392 (9th Cir. 1997)	1
Davidson v. Cannon 474 U.S. 344 (1985)	7
Ferri v. Ackerman 444 U.S. 193 (1979)	4
Hafer v. Melo 502 U.S. 21 (1991)	7
Hughes v. Savell 902 F.2d 376 (5th Cir. 1990)	7
Idaho v. Coeur d'Alene Tribe of Idaho 65 U.S.L.W. 4540 (June 23, 1997)	3, 4, 6, 7
In re Allison 66 Cal. 2d 282 425 P.2d 193 (1967)	5
Martinez v. California 444 U.S. 277 (1980)	4
McMillian v. Monroe County, Alabama 65 U.S.L.W. 4403 (June 2, 1997)	8

TABLE OF AUTHORITIES, CONT'D

Pennhurst State School & Hospital v. Halderman
465 U.S. 89 (1984) 4, 5, 8

Pennsylvania Bureau of Corrections v. United States Marshalls Service
474 U.S. 34 (1985) 6

Printz v. United States
65 U.S.L.W 4731 (June 27, 1997) 6

Schuer v. Rhodes
416 U.S. 232 (1974) 4

Williams v. Horvath
16 Cal.3d 834
548 P.2d 1125 (1976) 7

Constitutional Provisions

United States Constitution
Article III, § 2 1
Eleventh Amendment 2

TABLE OF AUTHORITIES, CONT'D

Statutes

28 United States Code
§ 1254(1) 1
§ 1331 3
§ 1367 3

42 United States Code
§ 1983 7

California Government Code
§ 825 8
§ 825.6 8
§ 844.5 8

California Penal Code
§ Code 240 5
§ Code 242 5

Title 15, California Code of Regulations
§§ 3276, 3279 5

Other Authorities

J. Madison
The Federalist No. 44 5

J. Orth, The Judicial Power of the United States--The Eleventh Amendment in American History (1987) 4

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No.

STEVE BRODEUR and DR. ALEX ASTORGA, *Petitioners*,

v.

TODD LEWIS ASHKER, *Respondent*.

OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, *Ashker v. California Department of Corrections*, 112 F.3d 392 (9th Cir. 1997) was issued for publication on April 18, 1997. A copy of it is attached as Exhibit A to this petition.

STATEMENT OF JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. section 1254(1), to review the judgment of the United States Court of Appeals for the Ninth Circuit. This petition is being filed within 90 days of the judgment of the court of appeals.

CONSTITUTIONAL, PROVISIONS INVOLVED

Article III, section 2 of the United States Constitution declares:

> The judicial power shall extend to all cases in law or equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under the grants of different states; and between a state or the citizens thereof, and foreign states, citizens, or subjects.

The Eleventh Amendment of the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE

California maximum security prisoner Todd Ashker attacked inmate Fierro in the security housing unit at Pelican Bay State Prison on October 24, 1990. Correctional Officer Steve Brodeur was stationed in the control booth at the time the fight started. Officer Brodeur saw the fight and attempted with other staff members to stop it. When staff could not stop the fight without using force, Officer Brodeur shot Ashker because the officer feared that Fierro was at risk of death or great bodily injury. After Ashker was shot in the lower right arm, the fight ended.

Ashker later sued, both in their official and individual capacities, 27 state officials claiming the shooting and the subsequent medical care he received violated his federal civil rights as well as California state law. The suit challenged departmental policy and sought compensatory and punitive damages.

Jurisdiction in the district court was predicated on 28 U.S.C. section 1331 as to the federal claims, and 28 U.S.C. section 1367 (the supplemental jurisdiction statute) for the state law claims. Prior to trial all claims were dismissed against all defendants except petitioners. The four surviving claims were two under the Eighth Amendment for (1) excessive force and (2) deliberate indifference to serious medical needs, and two state law claims for (3) assault and battery and (4) medical malpractice. The jury returned defense verdicts in favor of petitioners on each of the federal claims for relief, but held them liable under the two state tort theories. The jury awarded Ashker $175,000 on the assault and battery claim against Officer Brodeur, and $50,000 on the medical malpractice claim against Dr. Astorga.

Officer Brodeur and Dr. Astorga timely appealed on the basis of Eleventh Amendment immunity. The Ninth Circuit Court of Appeals affirmed the judgment of the district court, reasoning that the Eleventh Amendment does not bar pendent state claims seeking damages against state officials in their personal capacities.

REASONS FOR GRANTING THE WRIT

The constitutional grant of judicial power in Article III, section 2 is explicitly limited by the States' grant of sovereign immunity under the Eleventh Amendment. *Idaho v. Coeur d'Alene Tribe of Idaho*, 65 U.S.L.W. 4540, 4542 (June 23, 1997). Petitioners respectfully submit Eleventh Amendment jurisprudence

needs clarification in cases when state officials, whether named in their official or individual capacities, are sued in federal court for allegedly violating state law.[1]

Grant of the petition in this case will allow this Court to settle the important question of law that has not been explicitly decided: whether, after *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984) ("*Pennhurst II*"), a state officer acting in an official capacity under state law can be sued individually in federal court, for money damages, when these actions are allegedly violative of state law. *Cf. Schuer v. Rhodes*, 416 U.S. 232, 238 (1974) (Eleventh Amendment does not bar suits seeking to impose personal liability against state officers sued in their individual capacities for alleged violations of federal constitutional or statutory rights.)

"When suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake." *Coeur d' Alene Tribe of Idaho* at p. 4548. The State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest. *See Martinez v. California*, 444 U.S. 277, 282 (1980); *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979) (when state law creates a cause of action, the state is free to define the defenses to that claim, unless the state rule is in conflict with federal law).

Conversely, at the same time that a State's interest in the interpretation of its law is predominant, federal interests are at their least. "A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is

---

1. Eleventh Amendment jurisprudence has not been a model of logical symmetry, but marked rather by a baffling complexity. See J. Orth, The Judicial Power of the United States--The Eleventh Amendment in American History (1987).

difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst II, supra* 465 U.S. at 106 ("[W]hen a plaintiff alleges that a state official has violated state law, . . . this need to reconcile [the] competing interests [of federal and state law] is wholly absent"). *Ibid.*

There are good reasons why a federal court should not be telling state officials how to act under state law. The "uncertain and ephemeral" construction of state law by a federal judge gives a state's courts "no opportunity to review the federal courts' construction of its opinion, or their choice of remedies." *Id.*, 465 U.S. at 122 n. 32. The only review available to state officials when a federal court issues its decision is in federal court. Here, for example, there is no state court review available to petitioners to assess whether the district court correctly applied California law, or even to examine whether they truly violated any state law.[2] This absence of review robs state officials of their right to accountability by judges sworn to uphold California law.[3] Moreover, State

---

2. In California, assault and battery are crimes as well as torts, with the statutory definition of the crimes in the Penal Code. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Pen. Code § 240. "A battery is any wilful and unlawful use of force or violence upon the person of another." Cal. Pen. Code § 242. In prisoner cases claiming unreasonable use of force by a correctional officer, the California Supreme Court has held the prisoner must allege and prove that "cruel, inhuman, or excessive punishment was inflicted upon him in violation of his fundamental and basic rights." *In re Allison*, 66 Cal. 2d 282, 293, 425 P.2d 193, 199 (1967). Title 15, California Code of Regulations, §§ 3276, 3279 explicitly authorize the use of deadly force by correctional officers when necessary to protect the life of another.

3. *See* J. Madison, The Federalist No. 44, at 312: "The members of the federal government will have no agency in carrying the State

officials do not obtain the uniformity that can be expected from state appellate court review. An essential attribute of California's retained sovereignty is that it remains "independent and autonomous" within its "proper sphere of authority." *Printz v. United States*, 65 U.S.L.W. 4731, 4740 (June 27, 1997). Whether viewed as a positive attribute of its sovereignty under the Tenth Amendment, or as a limitation on federal power under the Eleventh, California should have to not suffer the indignity of a federal judge instructing its officials on how to conform their conduct to state law.

After *Pennhurst II* it is certainly not tolerable for federal courts to tell state officials in injunctive relief cases how to act so as not to be in violation of state law. In our view it is just as intolerable in this, a damages case, to impose liability against state officials for actions taken by them within the scope of their official responsibilities. Regardless of the label of official versus personal capacity, the State's interest should prevail.

In addition, just as important to California as whether its officials may be sued is where the suit is to occur. "It is acknowledged that States have real and vital interests in preferring their own forum in suits brought against them, . . ." *Coeur d' Alene Tribe of Idaho,* at p. 4543 (plurality opinion). In this case State officers had to travel from northernmost California almost on the Oregon border to attend federal court in Oakland, when their local county court was open and available to hear and decide Ashker's complaints.[4]

Persons in Ashker's situation have a remedy. There is no absence of available state courts. Should they

---

constitutions into effect."

4. Not only that, Ashker had to be transported at State expense (*see Pennsylvania Bureau of Corrections v. United States Marshalls Service*, 474 U.S. 34, 39 (1985)), not to mention public risk.

wish to pursue only their federal claims, the federal courts are open to them; if they want to pursue only state torts, then the state court system provides an avenue for relief. But, if they want the advantage of both state and federal bites at the law, by bringing pendent state tort claims that could not be brought in federal court by themselves (*see Davidson v. Cannon*, 474 U.S. 344, 347-348 (1985)), then there is no great burden in requiring them to bring the combined claims in State court. California law provides an adequate judicial forum for adjudicating section 1983 cases (*see Williams v. Horvath*, 16 Cal.3d 834, 548 P.2d 1125 (1976)), with judges sworn to uphold both the federal and state constitutions.

There is conflict between the United States Courts of Appeals for the Ninth and Fifth Circuits as to whether Eleventh Amendment immunity applies to state officials sued in federal court for allegedly violating state law. The Ninth Circuit determined that Ashker's verdict could stand. This result conflicts with the Fifth Circuit's decision in *Hughes v. Savell*, 902 F.2d 376 (5th Cir. 1990). The court there held that because, as a matter of state law, Louisiana is liable for the negligence of its employees in failing to protect an inmate, any suit against the correctional officer is a suit against the state and is barred by the Eleventh Amendment. *Id.* at 378. That decision, therefore, extends sovereign immunity to state officials sued for violating state law.

The Ninth Circuit's decision exalts "empty formalism" (*see Coeur d' Alene Tribe of Idaho,* at 4542) to determine that because Ashker's case against petitioners was a "personal capacity" suit it is not barred by the Eleventh Amendment. This formulation is borrowed from the federal procedure that governs suits against "persons" under 42 U.S.C. section 1983. *See Hafer v. Melo*, 502 U.S. 21 (1991). But, a party's liability to suit is a matter of state law, and it is that law which governs. *See McMillian v. Monroe County, Alabama*, 65 U.S.L.W. 4403, 4405 (June

2, 1997) (question whether the Sheriff acts as a county or State official is dependent on an analysis of state law).

Under California law, when a state employee is sued, the public entity which employs him has a duty to defend and to pay any judgment rendered. *Cal. Gov't. Code* § 825. The entity has no recourse against the employee unless his act was outside the scope of his employment or he was guilty of actual fraud or malice. *Cal. Govt. Code* §§ 825, 825.6; (section 844.5 applies to medical practitioners). The Ninth Circuit's rejection of petitioners' claim because California would indemnify them if they were found liable to Ashker for monetary damages, ignores reality and California law. (Appendix A, Opinion, at p. 9.)

California is the real party in interest when its employees are sued in federal court, with a heightened concern as to their liability under state law. It is indisputable that the acts of petitioners challenged in this case were taken within the course and scope of their official duties and, accordingly, within the scope of actions where liability is explicitly assumed by the State of California under its Tort Claims Act. Where, as here, the sole basis of liability is state law applied to state officials' actions taken in the course and scope of their employment, it should be the substance of the officials' acts under state law that controls, not the label attached to the complaint by the plaintiff. We submit that a claim that state officials violated state law in carrying out their official responsibilities is in legal and practical effect a claim against the State. *Pennhurst II*, 465 U.S. at 101-102.

This Court has "explicitly left open the question whether a state officer could be sued in his *personal* capacity under state tort law for monetary damages." (Appendix A, Opinion at p. 8.) Petitioners submit that the issue of whether claims seeking money damages against state officers, on the basis of state law for actions taken in their official capacities, may be heard in federal

court requires clarification by this Court in view of the importance of the state interests at stake and the paucity of federal concerns. Federal court jurisdiction over state tort law damages claims like those below subjects state tort law to the very problem resolved by *Pennhurst II* as to state law based equitable claims. The strong dictum of *Pennhurst II* should be made the holding of this case.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that this Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the decision below.

Dated: July 16, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
PETER J. SIGGINS
Senior Assistant Attorney General
MORRIS LENK
Supervising Deputy Attorney General

BRUCE M. SLAVIN
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioners

EXHIBIT A

Exh. 1a

EXHIBIT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TODD Lewis ASHKER,

Plaintiff-Appellee,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS,

Defendant,

and

Steve Brodeur; Alex Astorga, M.D.,

Defendants-Appellants.

No. 96-15135

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 3, 1997.

Decided April 18, 1997.

State prison inmate sued correctional officer and prison's physician under § 1983 alleging cruel and unusual punishment and under state tort law for assault and battery and medical malpractice. Upon jury verdict, the United States District Court for the Northern District of California, Claudia Wilken, J., entered judgment against

inmate on § 1983 claims, but awarded inmate $175,000 for assault and battery and $50,000 for medical malpractice. Defendants appealed. The Court of Appeals, David R. Thompson, Circuit Judge, held that: (1) Court of Appeals had jurisdiction to consider Eleventh Amendment immunity defense even though defense was not litigated in district court, and (2) defendants were sued in their personal capacities, even though state would indemnify them if they were required to pay damages, such that Eleventh Amendment did not bar suit.

Affirmed.

[1] FEDERAL COURTS 613
170Bk613
Court of Appeals had discretion to exercise jurisdiction to consider whether Eleventh Amendment immunity barred suit against state officers, even though officers failed to raise Eleventh Amendment defense in district court. U.S.C.A. Const.Amend. 11.

[2] FEDERAL COURTS 613
170Bk613
Correctional officer and prison's physician did not waive defense of sovereign immunity under the Eleventh Amendment in assault and battery and medical malpractice action brought by prison inmate, even though immunity defense was not litigated in district court, where defendants objected to inmate's complaint on sovereign immunity grounds and they asserted defense in their briefs filed in Court of Appeals. U.S.C.A. Const.Amend. 11.

[2] FEDERAL COURTS 774
170Bk774
Correctional officer and prison's physician did not waive defense of sovereign immunity under the Eleventh Amendment in assault and battery and medical malpractice action brought by prison inmate, even though

immunity defense was not litigated in district court, where defendants objected to inmate's complaint on sovereign immunity grounds and they asserted defense in their briefs filed in Court of Appeals. U.S.C.A. Const.Amend. 11.

[3] FEDERAL COURTS 269
170Bk269
Prison inmate sued correctional officer and prison's physician in their personal capacities for assault and battery and medical malpractice, even though state would indemnify them if they were required to pay damages to inmate, such that Eleventh Amendment immunity did not bar suit; inmate's pro se complaint stating that each defendant was being sued individually and in his/her official capacity was construed liberally to mean that defendants were sued in their personal capacities. U.S.C.A. Const.Amend. 11; West's Ann.Cal.Gov.Code § 844.6.
***392** George Prince, Deputy Attorney General, San Francisco, California, for defendants-appellants.

Herman A.D. Franck, V, and Stephen T. Gargaro, Franck & Franck, San Francisco, California, for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California, Claudia Wilken, District Judge, Presiding. D.C. No. CV-91-03952-CW.

Before: REINHARDT, HALL and THOMPSON, Circuit Judges.
***393** DAVID R. THOMPSON, Circuit Judge:

Todd Lewis Ashker, an inmate at Pelican Bay State Prison in California, sued prison officials Steve Brodeur and Dr. Alex Astorga (1) under 42 U.S.C. § 1983, alleging the officials violated the Eighth Amendment's cruel and unusual punishment clause, and (2) under California state tort law for assault and battery and medical malpractice.

[FN1] A jury found against Ashker on his federal section 1983 claims, but in favor of him on his supplemental state tort claims. Brodeur and Astorga appeal. They contend the Eleventh Amendment bars Ashker's state tort claims.

> FN1. Although Ashker also sued the California Department of Corrections, as well as other individual prison officials, no answer was filed on behalf of the Department or the State of California, and the action was not prosecuted against either of them. With regard to the individual defendants other than Brodeur and Astorga, all of them dropped out of the case, and the action proceeded only against defendants Brodeur and Astorga.

We have jurisdiction under 28 U.S.C. § 1291 and we affirm. We conclude that Ashker sued Brodeur and Astorga in their individual capacities, and as a result the Eleventh Amendment does not bar Ashker's state law claims.

FACTS

In October 1990, Ashker got into a fist fight with another inmate. To stop the fight, Correctional Officer Brodeur shot Ashker in the arm with an assault rifle. The surgeon who treated Ashker recommended that he be shipped out to a non-prison hospital for immediate treatment. Nevertheless, the prison infirmary doctors, under Dr. Astorga's supervision, placed a cast on Ashker's arm, but did not otherwise attend to his injury.

Ashker developed an aneurysm in his arm. Prison officials ignored his repeated requests for medical care, and left him in a dirty cell for almost two months. Finally, the aneurysm in Ashker's arm exploded. Ashker was then flown to a non-prison hospital for emergency surgery.

Ashker sued Brodeur and Astorga under 42 U.S.C. §1983, alleging that Brodeur and Astorga violated the Eighth Amendment's prohibition against cruel and unusual punishment. Ashker also included in his complaint several supplemental state tort claims. Two of these supplemental claims survived Brodeur and Astorga's pretrial motions: (1) assault and battery against Brodeur, and (2) medical malpractice against Astorga. The district court exercised supplemental jurisdiction over these state law claims pursuant to 28 U.S.C. § 1367.

In their answer to Ashker's first amended complaint, and in their pretrial statement, Brodeur and Astorga raised the affirmative defense of Eleventh Amendment immunity. However, Brodeur and Astorga never litigated the Eleventh Amendment issue in the district court, and they never asked the district court to rule on the issue.

The jury returned a verdict against Ashker on his section 1983 claims, but found in his favor on the two supplemental state law claims. The jury awarded Ashker $175,000 for assault and battery, and $50,000 for medical malpractice. The court entered judgment in Ashker's favor in the amount of $225,000. This appeal followed.

DISCUSSION

Ashker first contends that we lack jurisdiction to consider Brodeur and Astorga's Eleventh Amendment immunity defense because they did not litigate that defense in the district court. We disagree.

[1] In Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Supreme Court held that a court of appeals may consider whether the Eleventh Amendment bars a suit against state officers even when the officers fail to raise the Eleventh Amendment defense in the district court. Id. at 677-78, 94 S.Ct. at 1362-63.

The Court observed that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." Id. at 678, 94 S.Ct. at 1363; see also ITSI TV Productions, Inc. v. Agricultural Ass'ns, 3 F.3d 1289, 1291 (9th Cir.1993). Accordingly, we have the discretion to exercise jurisdiction to consider the Eleventh Amendment immunity issue, and we do so.

***394** Even though the Eleventh Amendment immunity defense may be raised for the first time on appeal, Ashker contends Brodeur and Astorga waived the defense by failing to pursue it in the district court. The best support for Ashker's argument comes from the Supreme Court's dicta in Blatchford v. Native Village of Noatak, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991), in which the Court observed that, in another case, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), the state of Montana had waived its Eleventh Amendment immunity because it "had not objected in this Court on sovereign immunity grounds." Blatchford, 501 U.S. at 785 n. 3, 111 S.Ct. at 2584 n. 3; see also ITSI TV, 3 F.3d at 1291.

Balanced against this dicta from Blatchford is the well-established general rule that states cannot easily waive their sovereign immunity. See Micomonaco v. State of Washington, 45 F.3d 316, 319 (9th Cir.1995); Coeur d'Alene Tribe of Idaho v. State of Idaho, 42 F.3d 1244, 1249 (9th Cir.1994), cert. granted in part on other grounds, --- U.S. ----, 116 S.Ct. 1415, 134 L.Ed.2d 541 (1996), cert. denied in part, --- U.S. ----, 116 S.Ct. 1416, 134 L.Ed.2d 542 (1996); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 239-40, 105 S.Ct. 3142, 3146, 87 L.Ed.2d 171 (1985). Typically, "[w]aiver of Eleventh Amendment immunity by a state will be found 'only where stated by the most express language or by such overwhelming implication from the text [of a state statute]

as [will] leave no room for any other reasonable construction.' " Micomonaco, 45 F.3d at 319 (quoting Atascadero, 473 U.S. at 239-40, 105 S.Ct. at 3146).

[2] Here, Brodeur and Astorga did not waive the defense of sovereign immunity under the Eleventh Amendment. They "objected [to Ashker's first amended complaint] on sovereign immunity grounds", in their answer and pretrial statement in the district court, and they asserted the defense in their briefs filed in this court. If the Eleventh Amendment immunity defense ever was available to Brodeur and Astorga, they did not waive it.

Whether the Eleventh Amendment immunity defense was available to Brodeur and Astorga is the fundamental issue in this case. Ashker contends Brodeur and Astorga lack standing to assert the defense, because an Eleventh Amendment defense can only be asserted by the State, and the State is not a party to this proceeding and has never asserted the defense. In response to this contention, Brodeur and Astorga argue they are merely nominal defendants, the State is the real party in interest which will be called upon to pay any judgment against them, and as a result they have standing to assert the Eleventh Amendment as a defense. See Edelman, 415 U.S. at 663, 94 S.Ct. at 1355 (observing that "[i]t is ... well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment.").

Resolution of the standing question depends upon whether Brodeur and Astorga were sued in their individual capacities, and if so whether they were merely nominal defendants and the State was the real party in interest.

In Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), the Supreme

Court held that the Eleventh Amendment barred a federal district court from hearing a supplemental state law claim for an injunction against a state officer acting in his official capacity. The Supreme Court observed that "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when-as here-the relief sought and ordered has an impact directly on the State itself." Id. at 117, 104 S.Ct. at 917. The Supreme Court explicitly left open the question whether a state officer could be sued in his personal capacity under state tort law for money damages. Id. at 111 n. 21, 104 S.Ct. at 913 n. 21 (stating that "nothing in our opinion touches ... cases ... seeking money damages against the individual officer in tort").

In Pena v. Gardner, 976 F.2d 469 (9th Cir.1992), we answered this open question. We held that the Eleventh Amendment would not bar federal or pendent state claims seeking damages against a state official acting***395** personally. Id. at 472-74. We have not previously decided, however, how we determine whether a suit against a state officer is a "personal capacity" or an "official capacity" suit. [FN2]

> FN2. We did not reach this issue in Pena because the state officer defendants in Pena conceded that they were being sued in their personal capacities. See Pena, 976 F.2d at 473.

The Supreme Court's decision in Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991), guides us in answering this question. In Hafer, the Court differentiated between personal and official capacity suits in the context of federal claims under section 1983. See Hafer, 502 U.S. at 26, 112 S.Ct. at 362. The Court stated, "[t]he phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the

state officer is sued, not the capacity in which the officer inflicts the alleged injury." Id.

[3] The Hafer analysis may be applied to Ashker's state law claims against Brodeur and Astorga. Applying this analysis, we conclude Brodeur and Astorga were sued in their personal capacities. In his first amended complaint, Ashker alleged: "Each defendant and all of them are being sued individually and in his/her official capacity." Given that Ashker filed the complaint pro per and in forma pauperis, we construe it liberally to mean that he was suing Brodeur and Astorga in their personal capacities, and, in the alternative, in their official capacities.

Brodeur and Astorga nevertheless argue that, because California would indemnify them if they were required to pay damages to Ashker, Ashker's suit is not against them in their individual capacities. See California Government Code § 844.6. According to Brodeur and Astorga, because California would, in effect, be paying the damages, California is the real party in interest.

Brodeur and Astorga's indemnity argument is foreclosed by Demery v. Kupperman, 735 F.2d 1139 (9th Cir.1984). In that case, we characterized the indemnity arrangement between a state officer and the state as a "purely intramural arrangement" that should not "turn into an extension of sovereign immunity." Id. at 1147 (quoting and citing Ronwin v. Shapiro, 657 F.2d 1071 (9th Cir.1981)). We held that a state should not be able to extend "sovereign immunity to state officials merely by enacting a law assuming those officials' debts." Id.. Following Demery, we hold California's indemnification of Brodeur and Astorga does not render California the real party in interest.

We conclude that Ashker sued Brodeur and Astorga in their personal capacities for the state torts of assault and battery and medical malpractice. Because Ashker's suit against Brodeur and Astorga is a personal capacity suit, the Eleventh Amendment does not bar it. [FN3] Pena, 976 F.2d at 474.

FN3. To the extent that an alternative claim was asserted against the defendants in their official capacities, that claim is, of course, barred.

AFFIRMED.

END OF DOCUMENT